

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JAMES J. PERRYMAN**

Claimant

VS.

**ABF FREIGHT SYSTEMS**

Respondent

AND

**RELIANCE NATIONAL INDEMNITY CO.**

Insurance Carrier

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Docket No. 214,180

**ORDER**

Claimant appealed the Award dated December 9, 1997, entered by Administrative Law Judge John D. Clark. The Appeals Board heard oral argument in Wichita, Kansas, on June 12, 1998.

**APPEARANCES**

James B. Zongker of Wichita, Kansas, appeared for the claimant. Edward D. Heath, Jr., of Wichita, Kansas, appeared for the respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. In addition, at oral argument before the Appeals Board, the parties agreed claimant was earning \$18.46 per hour on the date of accident. Also at oral argument the parties agreed that claimant sustained a 5 percent whole body functional impairment as a result of the June 19, 1996 work-related accident.

**ISSUES**

Judge Clark awarded claimant a 5 percent permanent partial general disability based upon the whole body functional impairment rating. The claimant requested the Appeals Board to review the issues of (1) average weekly wage and (2) the nature and extent of injury and disability. Those are the only issues on this appeal.

**FINDINGS OF FACT**

After reviewing the entire record, the Appeals Board finds as follows:

- (1) On June 19, 1996, the claimant, James J. Perryman, injured his neck and back. The parties stipulated the accidental injury arose out of and in the course of employment with the respondent, ABF Freight Systems (ABF).
- (2) Judge Clark found that Mr. Perryman sustained an additional 4 percent functional impairment to the body as a result of the neck injury and an additional 1 percent impairment to the body as a result of the back injury. As indicated above, the parties stipulated that Mr. Perryman sustained a 5 percent whole body functional impairment as a result of his June 19, 1996 work-related accident.
- (3) Mr. Perryman was hired to work for ABF through the Teamster's Union Hall to work as a "casual" employee, meaning that under the Union contract he was only guaranteed to be paid for six hours whenever he was called to work.
- (4) Although Mr. Perryman was a truck driver, the Union sent him to ABF to work as a dock worker.
- (5) Mr. Perryman reported to work for ABF on June 19, 1996, and worked for eight hours. After an eight-hour break, Mr. Perryman reported back to ABF to work the night shift. During that second shift and after working on both shifts a total of approximately 14.5 hours, Mr. Perryman injured his neck and back when he was struck by falling freight. The parties stipulated that Mr. Perryman was earning \$18.46 per hour at the time of his accident.
- (6) Based upon the testimony of ABF's terminal manager, David Parman, the Appeals Board finds Mr. Perryman was a temporary, part-time worker who was not expected to work more than two eight-hour shifts. Mr. Parman did not intend to call Mr. Perryman back to work.
- (7) After recovering from the June 19, 1996 injury, Mr. Perryman has obtained employment with another employer as a delivery driver earning approximately \$280 per week.
- (8) The Appeals Board adopts Judge Clark's findings of fact to the extent they are not inconsistent with the above.

CONCLUSIONS OF LAW

(1) Because he has sustained an "unscheduled" injury, K.S.A. 1995 Supp. 44-510e governs the determination of Mr. Perryman's permanent partial general disability. That statute provides in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

(2) A part-time hourly employee is defined as someone who is expected to work on a regular basis less than 40 hours per week. K.S.A. 44-511(a)(4) provides in part:

The term "part-time hourly employee" shall mean and include any employee paid on an hourly basis: (A) Who by custom and practice or under the verbal or written employment contract in force at the time of the accident is employed to work, agrees to work, or is expected to work on a regular basis less than 40 hours per week; and (B) who at the time of the accident is working in any type of trade or employment where there is no customary number of hours constituting an ordinary day in the character of the work involved or performed by the employee.

As indicated above, the Appeals Board finds that Mr. Perryman was a part-time worker who was not expected to work after completing the 16 hours that comprised the two shifts he had been asked to work.

(3) The average weekly wage for a part-time worker who has worked for an employer less than one week is governed by K.S.A. 44-511(b)(5). That statute provides:

If the employee had been in the employment of the employer less than one calendar week immediately preceding the accident, the average gross weekly wage shall be determined by the administrative law judge based **upon all of the evidence and circumstances**, including the usual wage for

similar services paid by the same employer, or if the employer has no employees performing similar services, the usual wage paid for similar services by other employers. The average gross weekly wage so determined **shall not exceed the actual average gross weekly wage the employee was reasonably expected to earn** in the employee's specific employment, including the average weekly value of any additional compensation and the value of the employee's average weekly overtime . . . . (Emphasis added.)

(4) Considering all the evidence and circumstances, the Appeals Board finds Mr. Perryman's average weekly wage should be determined by multiplying his hourly wage rate by the total hours he was expected to work for ABF that week. Multiplying \$18.46 by 16 hours yields an average weekly wage of \$295.36, which is all Mr. Perryman would have earned working for ABF that week regardless of his injury.

(5) Because Mr. Perryman is now earning 90 percent or more of his pre-injury average weekly wage, K.S.A. 1995 Supp. 44-510e requires that his permanent partial general disability be limited to his 5 percent whole body functional impairment rating.

(6) The 5 percent impairment rating takes into account preexisting functional impairment and, therefore, the permanent partial general disability should not be further reduced.

(7) The Award dated December 9, 1997, should be modified to adjust the average weekly wage, which modifies the amount of permanent partial general disability benefits due.

(8) The Appeals Board adopts Judge Clark's conclusions of law as set forth in the Award to the extent they are not inconsistent with the above.

#### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award dated December 9, 1997, entered by Administrative Law Judge John D. Clark should be, and hereby is, modified to increase the average weekly wage to \$295.36 and increase the permanent partial general disability benefits as provided below.

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, James J. Perryman, and against the respondent, ABF Freight Systems, and its insurance carrier, Reliance National Indemnity Co., for an accidental injury which occurred June 19, 1996, and based upon an average weekly wage of \$295.36, for 22 weeks of temporary total disability compensation at the rate of \$196.92 per week or \$4,332.24, followed by 20.4 weeks at the rate of \$196.92 per week or \$4,017.17 for a 5% permanent partial general

disability, making a total award of \$8,349.41, which is due and owing less any amounts previously paid.

The Appeals Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July 1998.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James B. Zongker, Wichita, KS  
Edward D. Heath, Jr., Wichita, KS  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Director